MOTION FILED
JAN 5 1987

No. 86-270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-270

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE and
INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federal of Labor and Congres of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of the respondents. Counsel for the AFL-CIO have been unable to obtain the petitioners' consent to the filing of that brief.

INTEREST OF THE AMICUS CURIAE

The AFL-CIO is a federation of 91 national and international labor organizations having a total membership of approximately 13,000,000 working men and women.

The Federation and its affiliated unions are presently, and over the years have been, parties to numerous cases raising First Amendment questions. While the factual context here is far removed from those which have generated that litigation, the doctrinal issues raised by the petitioners in this case cut across the entire field of free speech law and are thus of the most immediate concern to the labor movement. And precisely because the AFL-CIO's perspective on those issues is quite distinct from those of the parties to the case, we seek this opportunity to acquaint the Court with our views.

ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

As is more fully developed in the attached brief, this case raises fundamental question as to: the nature of the courts' authority to construe federal statutes in a manner that avoids possible constitutional difficulties; the scope of the "state action" doctrine; the extent of the "commercial speech" doctrine; and the place of "intellectual property" under the First Amendment. While we believe that the Court of Appeals came to the right result, that court did not break the case down into all its component parts and its answers to these questions are not therefore spelled out in detail. That approach makes analysis more difficult than it would otherwise be, particularly with regard to the "commercial speech" and "intellectual property" issues whose proper resolution is far from self-evident.

Against that background, the AFL-CIO's brief is structured to separate out each of the doctrinal areas implicated here and attempts to provide a more fully developed answer to each of the questions outlined above than is provided by the Court of Appeals opinion.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. The Court Of Appeals' Construction Of 36 U.S.C. § 380(a)(4) Is Correct	6
II. The Claim That USOC's Refusal To Permit The Gay Games To Be Denominated An "Olympics" Violates The First Amendment And Must Be Rejected For Lack Of State Action	12
III. SFAA's Unauthorized Use Of The Word "Olympics" To Promote The Gay Games Is Not Protected By The First Amendment	18
CONCLUSION	26

TABLE OF AUTHORITIES

CASES: Page

Blum v. Yaretsky, 457 U.S. 991 ..... 3, 4, 13, 14, 15, 17
Bolling v. Sharpe, 347 U.S. 497 13
Burton v. Wilmington Parking Authority, 365 U.S. 715 ..... 4, 16, 17, 18
Cohen v. California, 403 U.S. 15 ..... 5, 24
Commodity Futures Trading Comm. v. Schor, —— U.S. ——, 106 S.Ct. 3245 (July 7, 1986) 2, 11
CSC v. Letter Carriers, 413 U.S. 648 7
Evans v. Newton, 382 U.S. 296 18
Federal Election Comm. v. Mass. Citizens For Life, —— U.S. ——, 55 L.W. 4069 (Dec. 15, 1986) 4
Hudgens v. NLRB, 424 U.S. 507 ..... 5, 23, 26
In re Primus, 436 U.S. 412 ..... 4, 20, 21, 22
Jackson v. Metropolitan Edison Co., 419 U.S. 345 ..... 3, 4, 13
Marsh v. Alabama, 326 U.S. 501 18
Moore Ice Cream Co. v. Rose, 289 U.S. 373 ..... 2, 11
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 ..... 3, 13, 14
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 ..... 3, 10
Ohralik v. Ohio State Bar Assn., 436 U.S. 447 21
Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 26
Posadas de Puerto Rico Assoc. v. Tourism Co., —— U.S. ——, 106 S.Ct. 2968 (July 1, 1986) 4, 19
PruneYard Shopping Center v. Robins, 447 U.S. 74 26
Radzanower v. Touche Ross & Co., 426 U.S. 148 8
Regional Rail Reorganization Act Cases, 419 U.S. 102 ..... 2, 7, 11
Rendell-Baker v. Kohn, 457 U.S. 830 ..... 3, 14, 16, 17, 18
Shelley v. Kraemer, 334 U.S. 1 18
United States v. Johnson, 323 U.S. 273 7
Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 19
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 ..... 5, 23, 25, 26

TABLE OF AUTHORITIES—Continued

CONSTITUTION, STATUTES AND RULES: Page

Constitution of the United States:

First Amendment ..... *passim*
Fourteenth Amendment 13

Amateur Sports Act of 1978, Pub. L. No. 95-606, 78 Stat. 383:

36 U.S.C. § 380 ..... *passim*

Act of September 21, 1950, Pub. L. No. 81-805, 64 Stat. 899 ..... 7, 8
F.R. Civ. P. Rule 56(c) 18
U.S. Sup. Ct. Rule 21.1(a) 18

MISCELLANEOUS:

House Report No. 95-1627, 95th Cong., 2d Sess. 2, 8, 9
S. 2727, 95th Cong., 2d Sess. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-270

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.,
Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO contingent on the granting of the foregoing motion for leave to file that brief. The interest of the *amicus curiae* is set forth in that motion.

SUMMARY OF ARGUMENT

I. The Amateur Sports Act of 1978, grants to the United States Olympic Committee ("USOC") exclusive control of the use, in promoting, *inter alia*, any athletic performance or competition, of "the word 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or sim-

ulation thereof tending to cause confusion * * *." (36 U.S.C. § 380(a)(4) as amended.) Petitioner San Francisco Arts & Athletics Inc. (hereafter "SFAA") contends that § 380(a)(4) grants a right of action for an unauthorized use of the word "Olympic" *only* on a showing that the use tends to cause confusion with USOC's use of that word. That interpretation is foreclosed by the legislative history of the 1978 Act.

The present language of § 380(a)(4) originated in a House Committee substitute for a bill which had passed the Senate. The House Committee Report explained that the language was proposed by the Patent & Trademark Office of the Department of Commerce in a letter to the Chairman of the Subcommittee which was considering the Senate bill. The letter (which was appended to the Committee Report) states that the language "makes actionable *not only use of the words 'Olympic'*, 'Olympiad', 'Citius Altius Fortius', and any other combination thereof, but also any simulation or confusingly similar derivation thereof tending to cause confusion. * * *." (H. Rep. No. 95-1627, 95th Cong., 2d Sess. 15, 38.) Thus, the "tending to cause confusion * * *" clause clearly modifies only "any other combination thereof".

SFAA asserts (correctly) that a substantial First Amendment question is raised unless § 380(a)(4) is construed to require a showing that an unauthorized use of the word "Olympic" tends to confuse. SFAA argues, therefore, that its interpretation of that provision is required by the principle that "when a statute is ambiguous, 'construction should go in the direction of constitutional policy'." (*Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134.) But this sensible principle of judicial self-restraint "does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." (*Commodity Futures Trading Comm.* v. *Schor*, —— U.S. ——, 106 S.Ct. 3245, 3252 (July 7, 1986)). For, as Justice Cardozo wrote in *Moore Ice Cream Co.* v.

Rose, 289 U.S. 373, 379, "avoidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion." And the legislative history of § 380(a)(4) provides the requisite showing "of an 'affirmative intention of the Congress clearly expressed' to support an interpretation of a federal statute which 'would give rise to serious constitutional questions' ". (*NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500, 504 and 506.)

II. On this summary judgment record, it must be accepted that USOC was engaged in invidious discrimination against SFAA in denying to SFAA, while granting to others, the right to use the word "Olympic." But the Court of Appeals concluded that, as a matter of law, such discrimination is not state action and therefore not subject to constitutional limitations. This Court's decisions squarely reject the theory that because the federal government has granted USOC the power to choose among applicants seeking to use the word "Olympic" to promote athletic competitions, USOC's exercise of that power constitutes state action subject to constitutional restraints. (*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357; *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005; *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-980.)

SFAA has presented no evidence to suggest that the government is, in any way, involved in USOC's choices with respect to those who will be allowed and not allowed to use the word "Olympics." Rather SFAA argues that, "the governmental functions of regulating, controlling, sponsoring and raising funds for U.S. amateur athletic activities, including participation of the U.S. in the Olympices, are placed on USOC's shoulders by [the act of 1978]." (Pet. Br. 28). This argument fails because SFAA has not made a showing that those functions have ever been performed by the government, let alone the required showing that USOC is performing functions that are "traditionally the *exclusive* prerogative of the State."

(*Jackson*, 419 U.S. at 353; *Blum*, 457 U.S. at 1005 (emphasis added).) SFAA bases its "governmental function" theory entirely on *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715. But as was recently explained in *Rendell-Baker*, 457 U.S. at 842-843, *Burton* turned on the combination of state support of an enterprise and state profit from the enterprise's challenged discrimination. The fact that a private entity is using "public property" to perform a "public purpose" does not create a "symbiotic relationship" between that entity and the government or otherwise convert the private entity's decisions into state action.

III. As the parties recognize, the sole constitutional question presented by § 380(a)(4) is whether the First Amendment protects SFAA's use of the word "Olympic" to promote the Gay Games. This use appears at first blush to be "pure commercial speech which does no more than propose a commercial transaction," (*Posadas de Puerto Rico Assoc. v. Tourism Co.*, —— U.S. ——, 106 S.Ct. 2968 (July 1, 1968)), and as such, to be entitled to only limited First Amendment protection compared to other speech, and only "so long as it concerns a lawful activity and is not misreading or fraudulent" (*id.*). SFAA urges, however, that its use of the word "Olympic" is entitled to full First Amendment protection because its "sale of items with 'Olympic' is a subsidiary financial activity relative to the group's primary exercises of free expression and association." (Pet. Br. 33.) We agree with SFAA in this regard.

The Court held in *In re Primus*, 436 U.S. 412, that commercial speech analysis is inapplicable where the proposed sale of goods or services is "in the context of political expression and association"; in that context "a state must regulate with significantly greater precision." (*Id.* at 437-438.) The Court explained (*id.* at 438, n.32):

> Normally the purpose or motive of the speaker is not central to First Amendment protection, but it

> does bear on the distinction between conduct that is "an associational aspect of 'expresion', • • • [A]ppellant's speech—as part of associational activity—" was expression intended to advance "beliefs and ideas." In *Ohralik v. Ohio State Bar Assn.*, [436 U.S. at] 447, the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, cf. *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 787-788 (1976) (REHNQUIST, J., dissenting), but that is no reason for avoiding the undertaking.

However, to say that SFAA's use of the word "Olympics" is entitled to full First Amendment protection is not to say that SFAA is entitled to judgment in its favor. Under this Court's precedents, SFAA's First Amendment rights are subordinate to USOC's property rights in the word "Olympic". See *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573-77; *Hudgens* v. *NLRB*, 414 U.S. 507, 518-21.

The dissenting judges below do persuasively demonstrate, on the authority of *Cohen* v. *California*, 403 U.S. 15, 26 (Harlan, J.), that Congress has adversely affected SFAA's First Amendment interests by granting USOC an exclusive right to use and control the word "Olympic" with respect to the promotion of athletic events. That grant must therefore be justified by a substantial governmental interest. In this instance Congress' action in protecting USOC's intellectual property rights is fully justified because USOC and its predecessor organization have used the word "Olympic" since 1896, when the modern Olympic Games began. The special meaning which the word "Olympic" has for the general public (and its unique value to SFAA) is thus "the product of [USOC's] own talents and energy, the end result of much time, effort, and expense." *Zachinni*, 433 U.S. at 575.

ARGUMENT

This case raises fundamental questions as to: the nature of the courts' authority to construe federal statutes in a manner that avoids possible constitutional difficulties; the scope of the "state action" doctrine; the extent of the "commercial speech" doctrine; and the place of "intellectual property" under the First Amendment. In the argument that follows we treat with each of those questions in the same order as do the Court of Appeals and the petitioners.

I. The Court of Appeals' Construction of 36 U.S.C. § 380(a)(4) Is Correct

A. At bottom, the dispute in this case is over the scope of 36 U.S.C. § 380(a), as amended by the Amateur Sports Act of 1978 (hereafter "1978 Act").[1] That section provides in presently pertinent part as follows:

> § 380. Use of Olympic symbols, emblems, trademarks and names
>
> (a) Without the consent of the Corporation [the United States Olympic Committee (hereafter "USOC")], any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—
>
> • • • •
>
> (4) the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity; • • •[2]

---

[1] Pub. L. No. 95-606, 78 Stat. 383.

[2] The omitted portions of the provision protect the Olympic Committee's symbol and emblem, prohibit false representations of an association with the Committee and preserve the rights of persons who make certain otherwise infringing uses which were per-

San Francisco Arts & Athletics Inc. (hereafter "SFAA") contends that USOC has a right of action for an unauthorized use of the word "Olympic" only on a showing that the use tends to cause confusion with USOC's use of that word. According to SFAA, the statutory clause "tending to cause confusion" must be applied to the entire § 380(a)(4), including "the word "Olympic". (Pet. Br. 20.) On the other side, USOC contends that this clause's sole office is to modify the phrase "or any combination or simulation thereof", so that the unauthorized use of the word "Olympic" for any purpose set forth in § 380(a) is actionable without proof that the use tends to cause confusion. (See the opinion below, 781 F.2d 733, 736 describing the parties' respective positions.)

In support of its reading of § 380(a)(4), SFAA argues that "the presence of significant constitutional questions must guide [the Court] in the interpretation of Section 380." (Pet. Br. 38.) See also SFAA's Pet. for Cert. 24-25, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134-136 and *CSC* v. *Letter Carriers*, 413 U.S. 548, 571. As this Court put it in *Regional Rail*, "when a statute is ambiguous, 'construction should go in the direction of constitutional policy'." (419 U.S. at 134, quoting *United States* v. *Johnson*, 323 U.S. 273, 276.)

In this instance, as we now show, the USOC's admittedly broader reading of § 380(a)(4)'s prohibition is inescapable and the canon of statutory construction on which SFAA relies is therefore inapplicable by its own terms.

B. On a strictly linguistic level, both of the parties' interpretations of the bare words of § 380(a)(4) are tenable.[3] But this is a case in which the legislative history is

---

mitted prior to the Act of September 21, 1950, Pub. L. No. 81-805, 64 Stat. 899 (hereafter "1950 Act"), which was the antecedent of the 1978 Act.

[3] The punctuation of § 380(a)(4), specifically the absence of a comma between the phrase ending with "thereof" and the phrase

entirely unambiguous and specifically addresses the precise question of interpretation before the Court.

Section 380(a) is a substantial revision of § 9 of the 1950 Act, 36 U.S.C. § 379 (1976) (amended 1978). The bill which, as revised, became the 1978 Act was first passed by the Senate. As it passed that body, the bill would have amended § 9 (redesignated § 110 and so referred to thereafter)[4] by prohibiting, *inter alia*, the unauthorized use

> of the words "Olympic", "Olympian", "Olympiad", "Citius Altius Fortius", or any combination, simulation, or confusingly similar derivative thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity.[5]

The House Judiciary Committee, however, amended the bill by substituting the language which was ultimately enacted. The House Report explained that change as follows:

> *Section 110 allows the USOC to protect* (1) the symbol of the International Olympic Committee; (2) the emblem of the USOC; (3) any trademark trade name, sign, symbol, or insignia falsely representing association with or authorization by, the International Olympic Committee or the USOC; (4) *the words "Olympic", "Olympiad", "Citius Altius Fortius", or any combination or simulation thereof falsely suggesting a connection with the USOC* by civil action pursuant to the Trademark Act of 1946. The current charter contains a similar provision

---

beginning with "tending" is more consistent with USOC's reading. But this clue does not reveal Congress' intent so plainly that further inquiry is unnecessary.

[4] Section 201 of the Senate bill amends § 101(c) of the 1950 Act to redesignate the sections thereof. S. 2727, 95th Cong., 2d Sess., 124 Cong. Rec. 12865 (May 8, 1978).

[5] S. 2727, 95th Cong. 2d Sess., 124 Cong. Rec. 12866 (May 8, 1978).

> which provides for a criminal penalty in the case of an unauthorized use. However, this criminal penalty has been found to be unworkable as it requires the proof of a criminal intent. These changes were made in response to a letter from the Patent and Trademark Office of the Department of Commerce to subcommittee Chairman George Danielson which has been appended at the end of the report. [Emphasis added.] [6]

The underscored language paraphrases the language of the bill in a manner which sheds little, if any, light on the present question of interpretation.[7] However, the Committee Report makes clear that this, as well as other, changes in § 110 "were made in response to a letter from the Patent and Trademark Office of the Department of Commerce" to the Chairman of the Subcommittee which had considered the bill. That letter addresses the present question directly:

> Section 110(a)(4) makes actionable *not only use of the words "Olympic"*, "Olympiad", "Citius Altius Fortius", and any other combination thereof, *but also any simulation or confusingly similar derivation thereof tending to cause confusion*, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity. We believe that the phrase "or confusingly similar derivation" is too broad in scope and could encompass any designation with the root "olymp". We therefore believe that the phrase should be deleted. In such case the word "or" should be inserted before the word "simulation".
>
> *Section 110 carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohibitions, e.g. words described in section (a)(4) tending to cause confusion, to cause mistake, or to deceive with respect to the Corporation or any*

---

[6] House Report No. 95-1627, 95th Cong., 2d Sess., p. 15.

[7] Again, the absence of a comma after the word "thereof" tends to support USOC's view.

> *Olympic activity.* Accordingly, the Grandfather Clause should reflect the permissible continued use of terms under the existing statute which were lawfully used prior to September 21, 1950, and also the permissible continued use of terms under this bill whose lawful use commenced prior to the enactment of this legislation. This will avoid the preemption of existing lawful uses in both cases. [Emphasis added.] [8]

As the House Report states and the text of the Act shows, these suggestions were adopted.

It is clear, therefore, that, in choosing the language which became law, Congress intended in the first place to make actionable all unauthorized uses of the word "Olympic" "Olympiad" and "Citius Altius Fortius" for the purposes described in § 380(a) *without regard to whether the use would cause confusion*, and that Congress intended to make actionable also any combination or simulation thereof which tends to confuse. Indeed, SFAA's contention that the clause "tending to cause confusion * * *" applies to the use of the word "Olympic" is utterly irreconcilable with Congress' intent "to carry forward some prohibitions from the existing statute enacted in 1950". For the "confusion" clause was not contained in the 1950 Act and, therefore, could not modify and limit the earlier statute's prohibition against unauthorized use of the word "Olympic".

C. This Court has made it plain that a showing "of an 'affirmative intention of the Congress clearly expressed' " is required to support an interpretation of a federal statute which "would give rise to serious constitutional questions". (*NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500, 504 and 506.) Underlying this canon of construction, which serves the prudential purpose of avoiding unnecessary rulings concerning the constitutional limits on Congress' powers, is the entirely sensible presumption that Congress is duly mindful of these

---

[8] House Report, *supra*, p. 38.

limits and especially that the Legislature is properly loath to infringe upon constitutional liberties. See *Regional Rail*, 419 U.S. at 134 quoted at p. 7, *supra*.

This sensible principle of judicial self-restraint

> *does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication;* "'[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it.: *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964) (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961)). See also *Heckler* v. *Mathews*, 465 U.S. 728, 742-743 (1984). [*Commodity Futures Trading Comm.* v. *Schor*, —— U.S. ——, 106 S.Ct. 3245, 3252 (July 7, 1986) (emphasis added).]

In *Schor* the Court added:

> The canon of construction that requires courts to avoid unnecessary constitutional adjudication did not empower the Court of Appeals to manufacture a restriction on the CFTC's jurisdiction that was nowhere contemplated by Congress and to reject plain evidence of congressional intent because that intent was not specifically embodied in a statutory mandate. See *Heckler* v. *Mathews*, 465 U.S., at 742-743. [106 S.Ct. at 3255.]

See also *Federal Election Comm.* v. *Mass. Citizens For Life*, —— U.S. ——, 55 L.W. 4069 (Dec. 15, 1986) (rejecting the respondent's various suggestions for narrowing the scope of 2 U.S.C. § 441(b) so as to exclude respondent's activities from the scope of that section's prohibitions (*id.* at 4069-4071), and then declaring the section unconstitutional as applied to those activities (*id.* at 4071-4074)).

As Justice Cardozo wrote in *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379, the *locus classicus* on this point, "avoidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion. Here the

intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power." So here, also. As we have shown above, Congress, in enacting § 380(a), clearly expressed its "affirmative intention" that a tendency to confuse is not a necessary element of the cause of action created by that section to remedy unauthorized uses of the word "Olympic".[9]

II. The Claim That USOC's Refusal To Permit The Gay Games To Be Denominated An "Olympics" Violates The First Amendment Must Be Rejected For Lack Of State Action[10]

SFAA contends that USOC's refusal to permit SFAA to use the word "Olympics" to promote its Gay Games, although USOC has allowed other organizations to use that word in promoting their athletic competitions, is the product of an invidious discriminatory intent. SFAA asserts further that USOC is a "state actor" and that, therefore, this discrimination is unconstitutional. (Pet. Br. 28-30.)[11] On this summary judgment record,

---

[9] We do not say that the rule of construction discussed in the text is wholly inapplicable to § 380(a). For example, a proper application of the rule might alleviate the constitutional concerns expressed by the dissenting judges in the Court of Appeals based on the assumption that the majority view below would outlaw the use of the word "Olympic" by businesses in contexts wholly unrelated to athletic exhibitions. See 789 F.2d 1319, 1323, n.4. For there is no evidence that Congress intended, by the general statutory phrases, "for the purpose of trade", and "to induce the sale of any goods or services", to reach businesses whose use of that term derives from their location on Olympic Boulevard in Los Angeles, or in the City of Olympia, Washington. See *id.*

[10] The phrases "state action" and "state actor" are commonly used (as, for example, in petitioners' brief) even where the issue is the putative involvement of the federal government rather than the involvement of one of the states. We shall use that terminology herein.

[11] In formulating their question presented on the state action issue, petitioners refer to "the First and Fourteenth Amendments" (Pet. Br. i), and their argument refers only to "discrimination and

it must be accepted that USOC was engaged in invidious discrimination against SFAA, but the Court of Appeals correctly concluded that, as a matter of law, any such discrimination is not state action.

SFAA's argument reduces to the proposition that because the federal government has granted USOC the power to choose among applicants seeking to use the word "Olympic" to promote athletic competitions, USOC's exercise of that power constitutes state action which is subject to constitutional restraints. That theory has repeatedly been disapproved by this Court.

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173, the Court said:

> Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

Again, in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357, the Court held:

> At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so "state action" for purposes of the Fourteenth Amendment. [Footnote omitted.]

And in *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005, the Court reiterated:

---

suppression of First Amendment rights" (Pet. Br. 29). The Fourteenth Amendment is plainly inapplicable but, for purposes of this brief *amicus curiae*, we indulge the assumption that petitioners are invoking the Fifth as well as the First Amendment. (Cf. *Bolling* v. *Sharpe*, 347 U.S. 497.)

> • • • [A]lthough the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. *Flagg Bros., Inc.* v. *Brooks*, [436 U.S. 149] at 166; *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 357; *Moose Lodge No. 107* v. *Irvis*, *supra*, at 173; *Adickes* v. *S. H. Kress & Co.* [398 U.S. 144], at 170. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment. See *Flagg Bros.*, *supra*, at 164-165; *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 357.[12]

See also *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 839-840.

The operation of the standard is well illustrated by the *Moose Lodge* case. The Lodge was a private club which had been granted a license to sell alcoholic beverages under Pennsylvania's liquor regulations; Irvis had been denied service in the Lodge's dining room and bar because of his race. In applying the above-quoted test, the Court held that the facts that the state had issued the liquor

---

[12] See also the preceding paragraph of the *Blum* opinion:

> • • • "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S., at 350. The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.*, at 351. The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties. [Emphasis in original.]

license, that licensees enjoyed a partial monopoly, and that licensees were closely regulated were not singly or jointly sufficient to render the Lodge's discrimination, state action. (407 U.S. at 173-177.) The Court did conclude, however, that because the state liquor board regulations required the Lodge to adhere to its constitution and bylaws, the state was putting its compulsion behind the Lodge's discriminatory membership rules. (*Id.* at 177-179.) The Court therefore directed that the enforcement of that regulation be enjoined as unconstitutional insofar as the regulation required compliance with those provisions. (*Id.* at 179.)

In the present case, SFAA has presented no evidence to suggest that the government is, in any way, involved in USOC's choices with respect to who will be allowed and not allowed to use the word "Olympics". And, of course, there is no evidence of any governmental involvement in USOC's particular choice not to consent to SFAA's use of that word in sponsoring the Gay Games. Rather, referring to the 1978 Act, SFAA argues "that the governmental functions of regulating, controlling, sponsoring and raising funds for U.S. amateur athletic activities, including participation of the U.S. in the Olympics, are placed on USOC's shoulders by this scheme of federal law." (Pet. Br. 28.) SFAA thus invokes the principle described as follows in *Blum*, 457 U.S. 1005:

> [T]he required nexus [between private action and the state] may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State." *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 353; see *Flagg Bros, Inc.* v. *Brooks*, *supra*, at 157-161.

SFAA's argument fails because there is no basis for its assertion that the described activities of USOC are "governmental functions". Indeed, SFAA has made no showing that those functions have ever been performed by the government, let alone the "*required*" showing that

USOC is performing functions that are "traditionally the *exclusive* prerogative of the State".

The grounds that SFAA does advance for its claim that USOC's activities are governmental functions are plainly insufficient under this Court's precedents. SFAA relies most heavily on the fact that in the 1978 Act Congress granted the USOC certain powers which USOC is free to exercise in a discriminatory fashion and in a manner that denies SFAA freedom of speech. (Pet. Br. 28-30.) But the fact the government has granted such powers merely raises the state action issue; it does not establish that the granted powers are "governmental" (Pet. Br. 29). This is clear, with respect to powers that may be exercised in a discriminatory fashion from *Moose Lodge*, see pp. 14-15, *supra*. And SFAA's contention that "to restrain free expression and to chill expressive association * * *" (Pet. App. 29) is necessarily a governmental function is likewise unsound, as the Court of Appeals correctly appreciated:

> That the United States conferred special property rights in USOC's trademarks does not make USOC's exploitation of those rights state action. Many property rights, such as ordinary trademarks and copyrights, [citations omitted], or the right to exclude, see *Hudgens* v. *NLRB*, 424 U.S. 507, 512-21 (1976), can be enforced to limit protected speech without violating the Constitution because there is no state action. [781 F.2d at 737.]

Indeed, in *Rendell-Baker* one of the plaintiffs' contentions was that they had been discharged by their privately-operated school "because of their exercise of their First Amendment right of free speech" (457 U.S. at 837), but the Court concluded that the school, in so discharging them, was not engaged in state action.

SFAA does not discuss any of the above-cited state action precedents; instead SFAA bases its governmental function theory entirely on *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715. The requisites for a *Burton*

state action finding were recently restated in *Rendell-Baker*:

> In *Burton*, the Court held that the refusal of a restaurant located in a public parking garage to serve Negroes constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. 365 U.S., at 722. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions. Here [in *Rendall-Baker*] the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbiotic relationship such as existed in *Burton* exists here. [457 U.S. at 842-843.]

Thus, *Burton* turned on the *combination* of state support of an enterprise and state profit from the enterprise's challenged discrimination. As the Court made clear in *Rendell-Baker*, the fact that a private entity is using "public property" to perform a "public purpose" does not create a "symbiotic relationship" between that entity and the government, nor does it otherwise convert the private entity's decisions into state action. (457 U.S. at 840-842.) It follows that even if it is considered that the USOC is, in effect, being subsidized by the grant of the exclusive use of the Olympic words and symbols, that subsidy does not render its independent actions in exploiting that grant state action.[13]

---

[13] SFAA argues that it was entitled to a trial on the state action issue because this Court has stated "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed to its true significance." (Pet. Br. 30, quoting *Burton*, 365 U.S. at 722.) The quoted statement is incontrovertible (see also *Blum*, 457 U.S. at 1004 quoted, p. 14, *supra*), but does not warrant the conclusion that a trial

In sum, SFAA's argument that USOC is a "state actor" in refusing to consent to SFAA's use of the word "Olympics" is without merit.

We note finally that, in a separate point of their brief, petitioners advance an alternative state action theory: that the District Court's entry of an injunction against SFAA's unauthorized use of the word "Olympic" constitutes state action under *Shelley* v. *Kraemer*, 334 U.S. 1 (Pet. Br. 31.) If that contention were properly before the Court, it would raise a serious question and might well alter the proper outcome. But in seeking review of the Court of Appeals' state action holding SFAA's petition for certiorari proceeded entirely on the theory that *USOC* is a "state actor." Pet. for Cert. 36-41) citing *Burton* v. *Wilmington Parking Authority*, *supra*, *Rendell-Baker* v. *Kohn*, *supra*, *Evans* v. *Newton*, 382 U.S. 296 and *Marsh* v. *Alabama*, 326 U.S. 501. Petitioners' entirely distinct *Shelley* theory—that the *courts* are the operative state actors—is not "fairly included within the Question Presented and therefore not properly before the Court." (U.S. Sup. Ct. Rule 21.1(a).) See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 151, n. 3.

III. SFAA's Unauthorized Use Of The Word "Olympics" To Promote The Gay Games Is Not Protected By The First Amendment

A. Discussion of the First Amendment issue raised by § 380(a)(4) is clarified and narrowed by respondents' important—and we believe compelled—concession in this Court:

> Despite Petitioners' cry that § 380 gives the U.S. Olympic Committee the "power to control the na-

---

must be had whenever the presence or absence of state action is controverted. In the absence of a "genuine issue as to any material fact" with respect to state action, cf. F.R. Civ. P. 56(c), the "sifting" and "weighing" called for by *Burton* can be done by the District Court, without trial. Here, SFAA has not identified any such factual issue.

> tion's political vocabulary" (Petition at 25), the statute is limited to uses of Olympic "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition." When one court found that "Olympic" was being used for political speech, it held that such use was not prohibited by § 380 because it was outside this "range of uses" prohibited by the statute. *Stop the Olympic Prison* v. *U.S. Olympic Committee*, 489 F. Supp. 112 (S.D.N.Y. 1980). [Resp. Br. in Opp. 11.]

The sole question presented therefore, is whether the First Amendment protects SFAA's use of the word "Olympics" to *promote* the Gay Games.

B. At first blush, SFAA's promotional activities appear to be "pure commercial speech which does no more than propose a commercial transaction," *Posadas de Puerto Rico Assoc.* v. *Tourism Co.*, —— U.S. ——, 106 S.Ct. 2968, 2976 (July 1, 1986) (*"Posadas"*), quoting *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748, 762. In this regard SFAA, like any other sponsor of an entertainment, is seeking to induce potential patrons to come to the box office. Under this Court's decisions, such "pure commercial speech" is entitled to only limited First Amendment protection compared to other speech, and only "so long as it concerns a lawful activity and is not misleading or fraudulent" (*Posadas*, 105 S.Ct. at 2976).[14]

SFAA urges, however, that its use of "Olympic" is entitled to full First Amendment protection:

> If section 380 is read to mean that Congress intended to empower USOC to be the arbiter of all uses of "Olympic," even among nonprofit groups engaged in essentially noncommercial activity w[h]ere the sale of items with "Olympic" is a subsidiary financial activity relative to the group's primary exercises of

---

[14] The latter qualification is inapposite here since, as shown in part I, § 380(a)(4) is not limited to uses which tend to confuse the public, and the judgment below does not rest on any finding of confusion.

> free expression and association, see *New York Times* v. *Sullivan*, 376 U.S. 255 (sic), 265-266 (1964) and *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943), then section 380 is unconstitutional as applied to the use of 'Olympic' by SFA&A and Waddell and those associated with them in the promotion of the Gay Olympic Games. [Pet. Br. 33.]

Implicit in SFAA's argument is the proposition that where the seller's objective is "political and philosophical," his statements aimed at promoting sales are not commercial speech. (Pet. Br. 5.) We agree, but because SFAA does not spell out the reasons why this is so and because this point is doctrinally significant, some elaboration is required.

This Court's decisions have confined the "commercial speech" concept to speech which does no more than propose a commercial transaction—*viz.*, to speech which proposes the purchase or sale of goods and services. The Court thereby protects First Amendment values because only a narrow, readily identified class of transactions is subject to diminished First Amendment protection. Moreover, by thus circumscribing the concept, the Court reduces constitutional controversy concerning the characterization of particular speech; contrast, for example, the abundant litigation in this and the lower courts as to whether a defamed individual is a "public figure".

It is entirely consistent with the first of these considerations to allow exceptions from the "commercial speech" class on the basis that the transaction proposed has objectives which transcend the commercial, and which are of substantial First Amendment value. However, because questions of "objective" and "purpose" are often difficult to resolve, such an exception introduces uncertainty and invites litigation.

The tension between these two concerns was resolved by this Court in favor of the free speech interest in *In re Primus*, 436 U.S. 412. The Court there rejected "the proposition that a State may regulate in a pro-

phylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman." (*Id.* at 437.) The Court acknowledged, however (*id.*):

> Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction," *Pittsburgh Press Co* v. *Human Relations Comm'n*, 413 U.S. 376, 385 (1973). See *Ohralik* [v. *Ohio State Bar Assn.*, 436 U.S. 447,] at 455-459.

Indeed, in *Ohralik*, which was decided on the same day as *Primus*, the Court held that an attorney's solicitation of a client in a purely commercial transaction is subject to regulation under the limited protection afforded by "commercial speech" analysis.[15] But because Primus's solicitation was not for the purpose of pecuniary gain, but rather on behalf of an organization (the American Civil Liberties Union) which "engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public" (436 U.S. at 431), "commercial speech" analysis was inapplicable: "In the context of political expression and association, however, a state must regulate with significantly greater precision" (*id.* at 437-438).

---

[15] The *Ohralik* Court said, *inter alia*:

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy*, *supra*, at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n.24. We have not discarded the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* [436 U.S. at 455-456.]

In an accompanying footnote, the Court recognized and discussed the implications of the difference in the results in *Ohralik* and *Primus*:

> Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is "an associational aspect of 'expression'," Emerson, Freedom of Association and Freedom of Expression, 74 Yale L. J. 1, 26 (1964), and other activity subject to plenary regulation by government. [*N.A.A.C.P.* v.] *Button* recognized that certain forms of "cooperative, organizational activity," 371 U.S. 415 at 430, including litigation, are part of the "freedom to engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958), and that this freedom is an implicit guarantee of the First Amendment. See *Healy* v. *James*, 408 U.S. 169, 181 (1972). As shown above, appellant's speech—as part of associational activity—was expression intended to advance "beliefs and ideas." In *Ohralik* v. *Ohio State Bar Assn.*, *post*, p. 447, the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, cf. *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 787-788 (1976) (REHNQUIST, J., dissenting), but that is no reason for avoiding the undertaking. [436 U.S. at 438, n.32.]

It follows from *Primus* that if the purpose of SFAA's use of the word "Olympics" is to further "political expression and association", that use is not "commercial speech". We believe that SFAA's purpose is fairly so characterized.[26]

---

[26] The basis for SFAA's characterization of its activities as "essentially noncommercial" is elaborated in its statement of the case. (Pet. Br. 4-5.) Briefly, SFAA points out that it is a nonprofit

C. To say that SFAA's use of the word "Olympics" is entitled to full First Amendment protection is not to say that SFAA is entitled to judgment in its favor. As the Court of Appeals explained:

> • • • [T]he word "olympic" and its associated symbols and slogans are essentially property. Such property rights can be protected without violating the First Amendment. *See Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573-77 (1977) (property rights in performance of human cannonball act may properly receive priority over First Amendment rights of broadcasters, *Hudgens* v. *NLRB*, 424 U.S. 507, 518-21 (1967) (state private property rights defeat claim to speak freely on the property of another). [781 F.2d at 737].

Since we must brief this case on the basis of "the law as it now is, [rather than as we] might wish it to be" (cf. *Hudgens*, 424 U.S. at 518), we agree that *Zacchini* and *Hudgens* state the principle which governs here—*viz.*, that SFAA's First Amendment rights are subordinated to USOC's property rights in the word "Olympic".[17] While we believe that the court below reached the correct conclusion in this regard, again, the point is of doctrinal significance and the supporting reasons given seem to us to be incomplete.

The dissenting judges below emphasized:

> To say that the word Olympic is property begs the question. What appellants challenge is the power

---

corporation whose purpose is, *inter alia*, to educate the public to view the gay movement favorably, and that the purposes of the "Gay Olympic Games" were to "provide a healthy recreational alternative to be a suppressed minority" and, again, to educate the public to a more favorable "characterization of gay men and women." (Pet. Br. 5.) See also 789 F.2d at 1321 (dissenting opinion).

[17] SFAA does not argue for a different balance between First Amendment and property interests than was struck in those cases, and the petition for certiorari does not appear to encompass that issue.

> of Congress to privatize the word Olympic, rendering it unutterable by anyone else in connection with any product or public event, whether for profit or, as in this case, to promote a cause. [789 F.2d at 1321.]

The dissenting judges below correctly pointed out, too, that Congress' power to grant to a private party the exclusive use of a particular word is not absolute, but is subject to First Amendment constraints. Words are essential to the communication of ideas; as Justice Harlan has written, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." (*Cohen* v. *California*, 403 U.S. 15, 26, quoted at 789 F.2d 1321.) Moreover, Justice Harlan reasoned in *Cohen* that

> words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. [403 U.S. at 26, quoted at 789 F.2d 1321.]

In this instance, for example, "[t]he word Olympic was no doubt chosen to foster a wholesome, normal image of homosexuals. Denying SFAA use of the word thwarts that purpose." (789 F.2d at 1321; dissenting opinion.)

In sum, the dissenting judges below persuasively demonstrate, on the authority of *Cohen*, that Congress has adversely affected SFAA's First Amendment interests by granting USOC an exclusive right to use and control the word "Olympic" with respect to the promotion of athletic events. Thus, that grant must be justified by a substantial governmental interest. It is doubtful whether enabling USOC to finance its activities by licensing the use of "Olympic" and of the other words and symbols set forth in § 380(a) would be a sufficiently compelling governmental interest standing alone. But that

interest does not stand alone. The USOC, and its predcessor organization,[18] have used the word "Olympic" since 1896, when the modern Olympic Games began. See the Trademark Registration reprinted in III Joint Appendix 378. That use fully justifies Congress' grant to USOC of a property right in the exploitation of the word "Olympic" for promotional purposes—especially where the promotion is of an athletic event—because it satisfies the standard correctly drawn by the dissenting judges below from *Zacchini*:

> [R]ights in intellectual property are limited to uses that have been invented, created or developed by the owner. They are not a wholesale prohibition against all public uses but provide limited protection for that which "is the product of [the owner's] own talents and energy, the end result of much time, effort, and expense." *Zacchini*, 433 U.S. at 575. [789 F.2d at 1322.]

And, as the dissenters acknowledged "So limited, rights in intellectual property are easily harmonized with the first amendment." (*Id.*)

This standard is entirely fair to SFAA. The special value which the word "Olympic" has for SFAA (see p. 24, *supra*), is due almost entirely to the efforts of the USOC (and those of respondent International Olympic Committee) in using that word in connection with the development, at those Committees' "time, effort and expense," of the modern Olympic Games. While the word traces its origins to the athletic competitions in ancient Greece (and, at a further remove, to Mount Olympus, the home of the Greek gods) "Olympics" would have little, if any, meaning to the general public in this country if the modern games established by the Olympic Committees had been conducted under a different name. That

---

[18] The USOC was formally constituted in 1921, replacing a more informally organized Olympic Committee.

being so, the "secondary meaning" [19] created by the Committees' own "talents and energy" is intellectual property entitled to the protections properly granted to such property.

Under this Court's precedents, we do not see how the First Amendment can be held to provide SFAA the right to exploit this secondary meaning of the word "Olympic", even to promote SFAA's legitimate political and associational objectives, any more than the First Amendment provides SFAA, or any other speaker, the right to exploit any other person's private property. *Zacchini* and *Hudgens* make it clear that Congress has the constitutional power to prevent such free riding and to protect the property owner's ability to exploit his property in his own best interests. Congress, of course, need not exercise that power to the fullest and may, instead, in order to facilitate free speech, grant the property owner a more limited bundle of rights. Compare *Hudgens*, *supra*, with *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74. But the point here is that the First Amendment, as construed by this Court, does not require the Legislature to do so.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

---

[19] Cf. *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U.S. 189, 194.